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Supreme Court of the United States

OCTOBER TERM, 1915.

THE JOHN CHURCH CO.,

Petitioner,

against

HILLIARD HOTEL COMPANY and HENRI DE MARTINI,

Respondents.

NOTICE OF MOTION AND PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

HOUSE, GROSSMAN & VORHAUS,
Attorneys for Petitioner,
No. 115 Broadway,
Manhattan,
City of New York.

The Hecla Press, 57 Warren St., N. Y. Tel. 6230 Barclay.

Notice of Motion.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

THE JOHN CHURCH CO.,
Petitioner,

against

HILLIARD HOTEL COMPANY and HENRI DE MARTINI,
Respondent.

Sirs:

PLEASE TAKE NOTICE, that upon the annexed petition, and upon a certified copy of the record herein 3
to be presented with the said petition, an application will be made to the Supreme Court of the United States, at a Term thereof, held at the Capitol in the City of Washington, on the 3rd day of April, 1916, at the opening of the Court on that day or as soon thereafter as counsel may be

4 heard, for a writ of certiorari herein as applied for in said petition.

Dated, New York, N. Y., March 16, 1916.

Yours, etc.,

HOUSE, GROSSMAN & VORHAUS,
Attorneys for Petitioner,
Office & Post Office Address,
No. 115 Broadway,
Borough of Manhattan,
City of New York.

To:

5 CAMPBELL & BOLAND, Esq
Attorneys for Respon
51 Chambers Stree
New York Cit

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Petition. 7

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

THE JOHN CHURCH CO.,
Petitioner,

against

HILLIARD HOTEL COMPANY and HENRI DE MARTINI,
Respondents. 8

To the Honorable the Supreme Court of the United States:

The John Church Co. hereby petitions for a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit to review the judgment and decree of that Court rendered on the 6 day of January, 1916, affirming a decree of the District Court of the United States for the Eastern District of New York, entered on the 14th day of May, 1915, dismissing the petitioner's Bill of Complaint, with costs.

Your petitioner respectfully shows that it is a corporation duly organized and existing under and by virtue of the Laws of the State of New York, having its office and principal place of business in the Borough of Manhattan, State of New York. 9

That on or about the 11th day of June, 1914, your petitioner brought an action in equity in the United States District Court for the Southern District of

10 New York against Hilliard Hotel Company and Henri de Martini, as defendants, under the provisions of the Copyright Law, in and whereby it was sought to restrain the said defendants from an infringement of a copyright owned by your petitioners upon a certain musical composition known as a march "From Maine to Oregon" and forming a part of a musical composition known as a Lyric Comedy and entitled, "The Glass Blowers"; and upon the Bill of Complaint and affidavits annexed thereto, duly noticed for argument, a motion for preliminary order of injunction to issue during the pendency of the said action, that a subpoena was thereupon duly issued upon the said
11 Bill of Complaint and the defendants duly appeared therein and interposed an answer and affidavits, and that thereupon the said motion or application for an injunction was duly brought on for argument before the Hon. E. H. LACOMBE, who after a hearing of the said matter issued an injunction restraining the infringement of the complainant's copyright as alleged in the said Bill of Complaint, that thereupon the defendants duly appealed from the said order to the United States Circuit Court of Appeals for the Second Circuit, and in order to avoid the printing of numerous papers, a stipulation was thereupon entered into between the attorneys for the complainant and the attorneys for the defendant as to the facts, which conceded the validity of
12 the copyright claimed by the complainant and the due publication of notice thereof, and then conceded in regard to the alleged infringement of the said copyright the following facts:

That the defendant Hilliard Hotel Company is a domestic corporation, created by and under the Laws of the State of New York, conducting and carrying on a hotel known as the Vanderbilt Hotel,

situate at the corner of Park Avenue and 34th 13
Street, in the Borough of Manhattan, City of New York, for the accommodation of travelers and guests, and that the defendant Henri de Martini is the leader of an orchestra employed by the defendant corporation and paid by it for services rendered in conducting an orchestra consisting of musicians, also paid by the defendant corporation, for the purpose of the entertainment of its guests by furnishing music in the dining room of the said hotel during mealtimes. No charge was made by defendant or its said leader for admission to the dining room in which said music was performed as aforesaid, nor for the privilege of hearing such performance. No additional charge was made for 14
meals furnished at the time when such music was performed, over the charge made when there was no music.

That on the 27th day of May, 1914, at the said Hotel Vanderbilt, the said defendant Henri de Martini, acting as the leader of said orchestra under said employment, for and in behalf of the defendant corporation, and by its authority and consent, caused to be performed by said musicians in the dining room of said hotel for the entertainment and in the presence of guests thereof, without any charge to them as aforesaid, the said musical composition, "From Maine to Oregon" the copyright whereof is owned by the complainant as aforesaid. 15

That the said performance was without the express authority or consent of the complainant.

That the defendants at the time of the commencement of this action intended to cause to be given similar performances at the said Hotel Vanderbilt, for the purpose and in the manner hereinbefore de-

16 scribed, and without the express authority and consent of the complainant.

That upon the said appeal the said order for injunction was reversed by the Circuit Court of Appeals and that upon such reversal the said Court wrote an opinion, which is published in volume *221 Federal Reporter,* at pp. 229, *et seq.*

That thereupon the action came on for trial and that for the purposes of the said trial the same stipulation as to facts was entered into between the parties as had been entered into upon the former appeal herein, and which is contained in the record (fols. 64-74), and that thereupon the Trial Judge deeming himself bound by the decision
17 of the Circuit Court of Appeals reversing the order for an injunction herein, dismissed the complainant's complaint with costs, and that a decree was entered thereupon, accordingly.

That thereupon an appeal was duly taken by this petitioner from such decree to the Circuit Court of Appeals for the Second Circuit, and that the said Court affirmed the said decree dismissing the complainant's complaint. That no opinion was written or delivered by the said Circuit Court of Appeals upon the said affirmance, but that undoubtedly the said Circuit Court of Appeals followed the opinion rendered upon the previous appeal as aforesaid.

Your petitioner claims that the decision of the
18 said Circuit Court of Appeals made in the first instance and followed in affirming the decree of dismissal of the complainant's complaint, erroneously construes the provisions of the Copyright Act, and that the said Circuit Court of Appeals erred in holding that the plaintiff had failed to establish a cause of action sustaining the dismissal of the com-

plaint, and your petitioner contends that a proper 19
construction of the Copyright Act prohibits performances at Hotels under the circumstances described in the complainant's complaint and conceded by the stipulated facts herein, without the authority of the owner of the copyright. That a large number of musical compositions as to which the copyright is owned by the complainant in the action herein referred to, are similarly performed throughout the country at hotels under the same circumstances as established in this action, and that a large number of copyrighted compositions are performed throughout the country at hotels without the recognition of the rights of the owners of such copyright or the payment of any royalty or 20
other compensation to such owner, and that it is of the utmost importance to owners of copyrights to have the question as to the legality or illegality of such performances finally established, and that such question is of great importance and should be reviewed by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify the case to this Court for review and determination, as provided in the Act of Congress designated as the Judicial Code, and that your petitioner may have such other 21
and further relief in the permises as to this Court may seem appropriate and in conformity with the said Act.

And your petitioner will ever pray, etc.

THE JOHN CHURCH CO.,
By MOSES H. GROSSMAN,
Counsel for the Petitioner.

22 UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

MOSES H. GROSSMAN, being duly sworn, says that he is counsel for the John Church Co., the petitioner named in the foregoing petition, and as such had charge for it of the case in the said petition mentioned, in the District Court of the United States for the Eastern District of New York and in the United States Circuit Court of Appeals for the Second Circuit, that he has read the said petition by him subscribed and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and be-
23 lief.

MOSES H. GROSSMAN.

Subscribed and sworn to before me
this 7th day of February, 1916.

PETER A. LEE,
Notary Public (Seal),
New York County.

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No. 930

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Petitioner,

against

HILLIARD HOTEL COMPANY and HENRI DE MARTINI,

Respondents.

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI.

CAMPBELL & BOLAND,
Attorneys for Respondents,
No. 51 Chambers Street,
City of New York.

Levi Cooke and
CHARLES J. CAMPBELL,
of Counsel.

The Hecla Press, 57 Warren St., N. Y. Tel. 6280 Barclay.

IN THE

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Respondent.

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI.

The respondent opposes the issuance of a writ of certiorari in this case for the following reasons:

The matter at issue is simple and has been exhaustively examined and clearly determined by the Circuit Court of Appeals for the Second Circuit in two separate cases, *Church* v. *Hilliard*, 221 Fed. Rep., 229, and *Herbert, et al.*, v. *The Shanley Company*, 222 Fed. Rep., 344, in both of which cases motions for writs of certiorari are now simultaneously made.

This case involves only one issue of law, to wit: Is a performance of a copyrighted musical composition, given by paid performers in a hotel dining room for the entertainment of its patrons, as a part

of the operation of the hotel, when no charge is made to patrons for the privilege of listening to such performance, a performance for profit within the meaning of Section 1, Sub-division e, of the Copyright Act?

POINT I.

The performance of a copyrighted musical composition in a hotel, to which no admission fee is charged and where the musical entertainment is incidental to the hotel business, is not a performance for profit within the meaning of Section 1, Sub-division e, of the Copyright Act.

A. *The whole controversy herein arises over the meaning of the words "for profit."*

In the District and Circuit Courts, in both the *Hilliard* and the *Shanley* cases, counsel for the publishers urged, as they now urge here, that this expression means "*for pay*" and also "*for any business purpose.*" This respondent, on the other hand, contends that the expression has no such broad meaning, but refers to performances to hear which an admission fee is charged, regardless of whether the performance produces a profit or is given with that purpose in view.

All parties interested in this litigation have agreed throughout that a performance where an admission fee is charged is a performance for profit.

The Copyright Act is silent as to the meaning of the words "for profit," except in Section 1, referring to coin-operated machines, which provides that:

> "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

Appellant urges that the performance of music is for profit because it is a part of the service in connection with the meal for which the restaurant receives pay. Music is not a necessary incident to the service of food; the guest who pays for a meal cannot insist upon having music during meals. Music is played only during certain hours, although meals are served at all hours, and the price of food and service is the same during the time when music is played as it is when the music is not furnished (Rec., fol. 71).

It may be assumed that the purpose for which the music is played is to attract patrons. This brings us back to the question whether the *purpose* with which the free performance is given determines its character as a performance for profit, in the absence of any proof that the free music actually increases the patronage and the gross receipts of the hotel from sale of food. The profits, if any, flowing from the free performance of music, are remote, conjectural and speculative.

If it is true that every free performance of music is for profit simply because it is given in the hope of attracting trade, then not only hotels and restaurants, but all other business establishments which furnish free music to their patrons, and also the paid performers, will be subject to a performing royalty. Not only this, but all paid musicians giving free performances of copyrighted music at any public meeting would be subject to a royalty.

In fact, counsel in the *Shanley* case contends that no musicians who are paid to give a public performance are exempt from payment of royalty unless their performance falls within the exceptions enumerated in Section 28 of the Act, which provides:

> "That nothing in this Act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

If this contention is sound, all paid performers would be subject to royalty even though they gave a concert for charitable or educational purposes, because they are performing for profit to themselves, and Section 28 only excepts performances of specified musical works by public schools, church choirs or octavo choruses.

A band employed by a municipality to give a free open-air concert for the benefit of citizens would be subject to royalty for each copyrighted selection performed.

A musician employed in a music store to perform a piece of copyrighted music in order to sell it for the mutual profit of composer and dealer would be giving a public performance for profit, and subject to royalty.

In this last case the absurdity and far-reaching consequences of counsel's contention are forcibly illustrated; the composer, according to counsel for petitioners, would be entitled to receive three separate royalties: (1) on the sale of the music from the publisher to the dealer; (2) from the dealer

who procures the performance to be given for a business purpose; (3) from the paid performer, who stands in the same position as the defendant De Martini in the case at bar.

It does not seem possible that Congress could have intended that the enumeration in Section 28 of certain special cases where music may be publicly performed without the consent of the owner of the copyright, should be exclusive, and thus nullify the provisions of Section e of paragraph 1 of the Act.

B. *There is no conflict between the Federal and State courts on this question.*

The appellant cites the *Weistblatt* case (58 Misc., 328) to support his argument that the Supreme Court of New York in an analogous matter has held that in an "indirect way a profit was made" out of a moving picture show operated as an inducement to draw trade to an ice-cream saloon, although no entrance fee was charged to such show. This is misleading.

The *Weistblatt* case was decided by the Supreme Court at Special Term in 1908. In 1912 the Court of Special Sessions of New York County reached exactly the opposite conclusion in the case of *People* v. *Martin*, 137 N. Y. Supp., 377, which held that a cabaret show in a restaurant was not a public performance for profit, because the show was merely incidental to the restaurant business, and hence required no license.

Again, in the case of *People* v. *Wacke*, 77 Misc., 196, decided by the County Court, Kings County, in June, 1912, that court held that one conducting a hotel is not guilty of violation of an ordinance

which prohibits conducting a common show without a license, by exhibition in such hotel of moving pictures, no admission fee being charged. The Court said, at page 200:

> "The defendant was not engaged in the moving picture business. He was conducting a hotel and was engaged in the hotel and liquor business. *He was exhibiting the pictures for the entertainment of his guests as an incident to his hotel business at the seashore.* The case of *People* v. *Royal*, 23 A. D., 258, seems to me to be decisive of the question under consideration."

In the *Royal* case the Appellate Division of the Supreme Court held that a person who hired a room where he illustrated tricks and devices of gamblers for the purpose of selling a book, no admission fee being charged, was not engaged in conducting an exhibition which required a license. The Court said the *sale of the book*, not the exhibition, *was the principal thing.* So in this case, the *sale of meals*, and not the performance of music, *is the principal thing and the source of profit, if any, to the hotel.* In the *Royal* case the Court said:

> "It is not denied but that the word exhibition, in its broad significance, would embrace what the defendant did in this case. But it is quite evident that the word, as used in the ordinance in question, is so used in a sense much more restricted. Given its broadest signification, there are a large class of business men that use various methods to attract custom and sell their goods that would be brought within its terms. Every contrivance for the automatic movement of dumb figures, used in display windows to attract attention, every exhibit of paintings for sale or to arouse interest and to attract

> visitors to public marts of trade, every person exhibiting exercising apparatus through the medium of an automaton or human being, every person displaying advertising matter, pictures and designs by means of a stereopticon, are a few of the very many things which would be brought within this ordinance if the word were to be construed in its general sense. The connection in which it appears in the ordinance shows that its meaning has relation to entertainments where the exhibition itself is the principal thing and from which the exhibitor derives or expects to derive profit."

All these cases, which were cited and evidently considered by the Circuit Court of Appeals in the *Hilliard* case, show that the State Courts and the Federal Courts are not in conflict in regard to the principle involved in the case at bar.

C. *The Sarpy case distinguished.*

The case of *Sarpy* v. *Holland* was followed by Mr. Justice LACOMBE in granting the original injunction order which was reversed by the Circuit Court of Appeals. This is the only case which the learned counsel for the publishers, both in the *Hilliard* case and the *Shanley* case, have been able to find, in their exhaustive research of the books, in support of their contention that a gratuitous performance of music is for profit if given as an incident to any business enterprise. The Court decided the *Sarpy* case under Section 1 of the English Copyright Act of 1882, which is as follows:

> "On and after the passing of this Act, the proprietor of a copyright in any musical composition first published after the passing of this Act, or his assignee who shall be entitled to and be desirous of retaining in his

> own hands exclusively *the right of public representation or performance of the same*, shall print or cause to be printed upon such title page of every published copy of such musical composition a notice to the effect that *the right of public representation or performance is reserved.*"

The *Sarpy* case is distinguishable from the case at bar. It will be noted the English statute confers greater rights upon the composer than the American. *Neither the words "for profit" nor any equivalent expression appear in the English Act;* hence, any public performance, whether it is for profit or not, is an infringement. The English Act gives the copyright owner of a musical composition the same rights which the United States Copyright Act gives to the owner of a drama or dramatico musical composition.

Dated, April 1st, 1916.

CAMPBELL & BOLAND,
Attorneys for Respondents,
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New York City.

Levi Cooke and

CHARLES J. CAMPBELL,
of Counsel.